

**DEPARTMENT OF STATE REVENUE
LETTER OF FINDINGS NUMBER: 07-0009
Sales and Use Tax
For Tax Years 2003-05**

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ISSUES

I. Sales and Use Tax—Imposition.

Authority: IC § 6-2.5-1-1 et seq.; IC § 6-2.5-2-1; IC § 6-2.5-3-1; IC § 6-2.5-3-2; IC § 6-2.5-3-4; IC § 6-2.5-5-2; IC § 6-8.1-5-1; IC § 6-8.1-5-4; 45 IAC 2.2-5-1.

Taxpayer protests the assessment of use tax on a variety of purchases.

II. Sales and Use Tax—Sales of Equipment.

Authority: IC § 6-8.1-5-1.

Taxpayer protests the assessment of sales tax on its sales of a variety of equipment.

III. Tax Administration—Negligence Penalty.

Authority: IC § 6-8.1-10-2.1; 45 IAC 15-11-2.

Taxpayer protests the imposition of a ten percent negligence penalty.

STATEMENT OF FACTS

Taxpayer operates a convenience store, repairs and sells equipment, cash rents farm land, and develops residential land. After an audit, the Indiana Department of Revenue ("Department") determined that Taxpayer owed additional sales and use tax and assessed a negligence penalty for the tax years 2003, 2004, and 2005. The Department found that Taxpayer had sold a variety of equipment without collecting and remitting sales tax on the sales. The Department also found that Taxpayer had made a variety of purchases on which the Indiana sales tax was not paid at the time of purchase nor was use tax remitted to the Department. Taxpayer protests the imposition of tax and penalty on certain of the property sales and purchases.

I. Sales and Use Tax—Imposition.

DISCUSSION

All tax assessments are presumed to be accurate; the taxpayer bears the burden of proving that an assessment is incorrect. IC § 6-8.1-5-1(c).

IC § 6-2.5-2-1 provides:

- (a) An excise tax, known as the state gross retail tax, is imposed on retail transactions made in Indiana.
- (b) The person who acquires property in a retail transaction is liable for the tax on the transaction and, except as otherwise provided in this chapter, shall pay the tax to the retail merchant as a separate added amount to the consideration in the transaction. The retail merchant shall collect the tax as agent for the state.

IC § 6-2.5-3-2(a) provides:

An excise tax, known as the use tax, is imposed on the storage, use, or consumption of tangible personal property in Indiana if the property was acquired in a retail transaction, regardless of the location of that transaction or of the retail merchant making that transaction.

Accordingly, Indiana imposes a sales tax on retail transactions and a complementary use tax on tangible personal property that is stored, used, or consumed in the state. IC § 6-2.5-1-1 et seq. An exemption from the use tax is granted for transactions where the gross retail tax (“sales tax”) was paid at the time of purchase pursuant to IC § 6-2.5-3-4. Since Taxpayer failed to pay sales tax at the time of purchase, the Department found that the purchases were subject to use tax.

A. Asphalt.

Taxpayer maintains that since the asphalt was used to widen the road to allow farm equipment to access the fields that Taxpayer cash rents, the asphalt is exempt from sales and use tax.

Taxpayer asserts that the asphalt would qualify for the agricultural production exemption provided in IC § 6-2.5-5-2, as follows:

- (a) Transactions involving agricultural machinery, tools, and equipment are exempt from the state gross retail tax if the person acquiring that property acquires it for his direct use in the direct production, extraction, harvesting, or processing of agricultural commodities.
- (b) Transactions involving agricultural machinery or equipment are exempt from the state gross retail tax if:

- (1) the person acquiring the property acquires it for use in conjunction with the production of food and food ingredients or commodities for sale;
- (2) the person acquiring the property is occupationally engaged in the production of food or commodities which he sells for human or animal consumption or uses for further food and food ingredients or commodity production; and
- (3) the machinery or equipment is designed for use in gathering, moving, or spreading animal waste.

Pursuant to 45 IAC 2.2-5-1(a), direct use in the direct production “requires that the property in question must have an immediate effect on the article being produced” meaning it “is an essential and integral part of an integrated process which produces food or an agricultural commodity.”

However, Taxpayer is not the person who is “occupationally engaged in the production of food” as required in IC § 6-2.5-5-2(b)(2), and is a land owner renting land to a farmer. Thus, the agricultural production exemptions are not available to Taxpayer. Nonetheless, the use of the asphalt, to assist in accessing the farm land, is not the requisite tools, machinery, or equipment, but is a material used in pre-production, which does not qualify for the direct use exemption.

Therefore, Taxpayer’s protest is respectfully denied.

B. Ice.

Taxpayer maintains that since ice is not a taxable item when sold individually and the ice that is used in the fountain sodas has tax collected on it when the customers purchase the fountain sodas, Taxpayer’s use of the ice is not subject to use tax.

During the course of the protest, Taxpayer was asked to submit documentation demonstrating that use tax was assessed for Taxpayer’s use of ice. Taxpayer failed to provide any documentation demonstrating the amount of use tax assessed for Taxpayer’s use of ice. In addition, Taxpayer did not cite any statute, regulation, or case law for the proposition that the Department was required to accept Taxpayer’s assertions as to the nature of these transactions without providing the supporting documentation.

In fact, IC § 6-8.1-5-4(a) provides:

Every person subject to a listed tax must keep books and records so that the department can determine the amount, if any, of the person’s liability for that tax by reviewing those books and records. The records referred to in this subsection include all source documents necessary to determine the tax, including invoices, register tapes, receipts, and canceled checks.

Pursuant to IC § 6-8.1-5-1(c), all tax assessments are presumed to be accurate, and the taxpayer bears the burden of proving that an assessment is incorrect. Since Taxpayer has failed to produce any documentation that demonstrates that the Department's assessment was incorrect, Taxpayer has failed to meet its burden.

Therefore, Taxpayer's protest is respectfully denied.

C. Bookkeeping Supplies.

The Department found that use tax was due on purchases of bookkeeping supplies that Taxpayer had made without paying sales tax on them.

Taxpayer asserts that it did not purchase bookkeeping supplies, but purchased bookkeeping services. Taxpayer maintains that Taxpayer's bookkeeper itemizes the bookkeeping services it provided to Taxpayer by listing separately the amount of the supplies that the bookkeeper consumed in performing the bookkeeping services on Taxpayer's invoices. Taxpayer provided documentation demonstrating that the bookkeeper buys the bookkeeping supplies, pays the sales taxes on the supplies at the time of purchase, and uses the bookkeeping supplies in performing the bookkeeping services.

Taxpayer has provided sufficient information demonstrating that the supplies are not tangible personal property transferred to and used by Taxpayer. Thus, the supplies are not subject to use tax.

Therefore, Taxpayer's protest is sustained.

D. Blacktop.

The Department found that use tax was due on a purchase of blacktop that Taxpayer had made without paying sales tax at the time of purchase.

IC § 6-2.5-3-1(a) defines "use" as "the exercise of any right or power of ownership over tangible personal property."

Taxpayer maintains that since Taxpayer donated the blacktop to a church to construct a parking lot, Taxpayer's use of the blacktop was not subject to use tax. However, Taxpayer's subsequent donation of the blacktop to the church does not have a "reach-back" effect negating the Taxpayer's responsibility to pay the sales tax at the time of purchase. Accordingly, Taxpayer engaged in a transaction, purchasing the blacktop, that was subject to sales and use tax and used the blacktop—i.e., exercised a right or power of ownership by giving the blacktop away. Therefore, the Department properly imposed use tax on the Taxpayer's use of the blacktop.

Therefore, Taxpayer's protest is respectfully denied.

FINDING

In summary, Taxpayer's protest of subpart C is sustained, and Taxpayer's protest of subparts A, B, and D are respectfully denied.

II. Sales and Use Tax—Sales of Equipment.

DISCUSSION

All tax assessments are presumed to be accurate; the taxpayer bears the burden of proving that an assessment is incorrect. IC § 6-8.1-5-1(c).

The Department found that Taxpayer had included a "semi tractor," a "CAT V180," a "fork truck," a "front end loader," a "tile machine," and a "welder" on Taxpayer's depreciation schedule for its adjusted gross income tax return. Based upon the "best information available," the Department removed equipment, which Taxpayer purchased for resale, from Taxpayer's depreciation schedule and assessed sales tax on Taxpayer's sales of the equipment.

Taxpayer maintains that the "semi tractor," the "CAT V180," the "fork truck," the "front end loader," the "tile machine," and the "welder" have not been sold and are currently in Taxpayer's inventory.

During the course of protest, Taxpayer submitted information and various pictures to demonstrate that the "semi tractor," the "CAT V180," the "fork truck," the "front end loader," the "tile machine," and the "welder" are currently in Taxpayer inventory of equipment held for sale.

Taxpayer has provided sufficient documentation to demonstrate that the equipment listed below is currently in its inventory and has not been sold:

Semi Tractor, p.17, amount \$10,741.50
CAT V180; p.9, amount \$12,000.00
Fork Truck; p.9, amount \$12,786.00
Front End Loader; p.17, amount \$30,000.00
Tile Machine; p.9, amount \$67,500.00

However, Taxpayer has not provided sufficient documentation to demonstrate that the "welder" has not been sold.

FINDING

Taxpayer's protest is sustained in part and denied in part.

III. Tax Administration—Negligence Penalty.

DISCUSSION

Taxpayer protests the imposition of the ten percent negligence penalty for the tax years in question. The Department refers to IC § 6-8.1-10-2.1(a)(3), which provides, “if a person. . . incurs, upon examination by the department, a deficiency that is due to negligence . . . the person is subject to a penalty.”

45 IAC 15-11-2(b) clarifies the standard for the imposition of the negligence penalty as follows:

Negligence, on behalf of a taxpayer is defined as the failure to use such reasonable care, caution, or diligence as would be expected of an ordinary reasonable taxpayer. Negligence would result from a taxpayer’s carelessness, thoughtlessness, disregard or inattention to duties placed upon the taxpayer by the Indiana Code or department regulations. Ignorance of the listed tax laws, rules and/or regulations is treated as negligence. Further, failure to read and follow instructions provided by the department is treated as negligence. Negligence shall be determined on a case by case basis according to the facts and circumstances of each taxpayer.

The standard for waiving the negligence penalty is given at 45 IAC 15-11-2(c) as follows:

The department shall waive the negligence penalty imposed under IC § 6-8.1-10-1 if the taxpayer affirmatively establishes that the failure to file a return, pay the full amount of tax due, timely remit tax held in trust, or pay a deficiency was due to reasonable cause and not due to negligence. In order to establish reasonable cause, the taxpayer must demonstrate that it exercised ordinary business care and prudence in carrying out or failing to carry out a duty giving rise to the penalty imposed under this section.

In this case, Taxpayer incurred a deficiency which the Department determined was due to negligence under 45 IAC 15-11-2(b), and so was subject to a penalty under IC § 6-8.1-10-2.1(a). While Taxpayer has established that it does not owe some of the proposed assessments, Taxpayer has not affirmatively established that its failure to pay the remaining deficiencies was due to reasonable cause and not due to negligence, as required by 45 IAC 15-11-2(c).

FINDING

Taxpayer’s protest to the imposition of penalty is respectfully denied.